No. 82-1565

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

BACCHUS IMPORTS, LTD., *et al.*,
Appellants,
v.
GEORGE FREITAS,
Director of Taxation of the State of Hawaii, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of Hawaii

BRIEF OF AMICUS CURIAE THE WINE INSTITUTE
IN SUPPORT OF REVERSAL

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INTEREST OF AMICUS CURIAE

The Wine Institute is a voluntary nonprofit trade association, organized under the laws of the State of California. It includes among its 467 members approximately 90 percent of the licensed wineries in California. Its members ship wines to customers throughout the country. The Institute and its members have a vital interest in preserving the free flow of interstate commerce in wine and wine products.[1]

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[1] This brief amicus curiae is filed in support of appellants, Bacchus Imports, Ltd. and Eagle Distributors, Inc., and of appellee Foremost-McKesson, Inc. It is accompanied by the written consents of the parties.

SUMMARY OF ARGUMENT

Hawaii Revised Statutes § 244-4 (Supp. 1982) subjects alcoholic beverages sold or used within Hawaii to a 20-percent tax based on the wholesale price of the liquor. In order to promote the state liquor industry, the Hawaiian legislature specifically exempted Hawaiian-made wine and okolehao (a type of brandy) from this tax, while leaving non-Hawaiian products subject to taxation. Appellants Bacchus Imports, Ltd. and Eagle Distributors, Inc. and appellee Foremost-McKesson, Inc. challenged the constitutionality of the tax under the U.S. Constitution in the Hawaii Tax Appeal Court. The Tax Appeal Court upheld the tax, and the Supreme Court of Hawaii affirmed. This appeal followed.

The Hawaii Supreme Court's decision should be reversed. On its face, the Hawaii liquor tax discriminates against out-of-state goods. Moreover, the Hawaii Supreme Court has affirmed that the state's goal in creating the discrimination was to promote local industry. That may be a valid goal for some purposes. But under the Commerce Clause of the U.S. Constitution state taxes that discriminate against out-of-state goods to promote local businesses have long been found *per se* unconstitutional. This principle, which the Court has consistently affirmed over the past 100 years, reflects the basic free-trade purpose of the Commerce Clause.

The Twenty-first Amendment does not alter this conclusion. To be sure, Section 2 of that Amendment empowers the states to prohibit the importation and transportation of liquor within their borders in order to combat evils thought to be associated with liquor and the liquor trade. But this Court has held that the states remain subject to other applicable constitutional provisions even when a state liquor regulation is intended to serve the purposes of the Twenty-first Amendment. If such a regulation clashes with interests protected by other con-

stitutional provisions, including the Commerce Clause, the competing constitutional interests must be balanced. In this case, the only interest asserted by the state—promotion of its local liquor industry—is unrelated to the purposes of the Twenty-first Amendment. Accordingly, the state's interest derives no constitutional support from the Amendment, and the Amendment cannot save the statute from being declared unconstitutional under the Commerce Clause.

ARGUMENT

I. The Hawaii Liquor Tax Violates the Commerce Clause Because It Discriminates Against Wines Produced Outside the State.

This case poses a simple and straightforward issue: may a state tax out-of-state goods discriminatorily to promote local business interests? The Supreme Court has consistently held that such taxes are flatly inconsistent with the Commerce Clause of the U.S. Constitution.

In the case before the Court, the relevant facts are undisputed. As the Hawaii Supreme Court noted, the Hawaii liquor tax "imposes a levy on the sale or use of alcoholic beverages amounting to twenty percent of the wholesale price of the liquor sold or used . . . ." Appendix to Jurisdictional Statement at A-4 (hereinafter "App."). In 1976, the Hawaii legislature added an exemption for transactions involving Hawaiian-made fruit wines, but it left sales of non-Hawaiian wines subject to taxation at the 20-percent rate.[2] After reviewing the legislative his-

[2] App. at A-34 n.8. The exemption applied to "[a]ny fruit wine manufactured in the State from products grown in the State for the period May 17, 1976 to June 30, 1981 . . . ." Hawaii Rev. Stat. § 244-4(7) (Supp. 1982). In 1976, the legislature also extended an existing exemption from the tax for Hawaiian-made okolehao (a brandy produced from roots of the Hawaiian ti plant). Hawaii Rev. Stat. § 244-4(6) (Supp. 1982). The Supreme Court of Hawaii found that the legislative purpose in exempting okolehao was "to

tory relating to the exemption, the state Supreme Court found that the state's legislative purpose was "'to help' in stimulating 'the local fruit wine industry'" by relieving the Hawaiian wine industry of a tax burden imposed on wines produced outside the state. App. at A-13.

The relevant Commerce Clause rules are equally clear. While the Commerce Clause is primarily a broad grant of power to Congress to regulate interstate and foreign commerce, it is well established that the Clause also acts directly to limit the powers of the states. As this Court has noted, the Commerce Clause "'by its own force created an area of trade free from interference by the States. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.'" *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328 (1977), *quoting Freeman v. Hewit*, 329 U.S. 249, 252 (1946).[3] For this reason, this Court has consistently held that taxes that discriminate against out-of-state goods or services are invalid under the Commerce Clause.[4]

'encourage and promote the establishment of a new industry.'" App. at A-13. In 1981, the legislature created a further exemption for "[r]um manufactured in [Hawaii] for the period May 17, 1981 to June 30, 1986." Hawaii Rev. Stat. § 244-4(8) (Supp. 1982). That exemption for Hawaiian rum is still in effect.

[3] *See also Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 335 (1977) (the Commerce Clause has a "free trade purpose"); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944) ("The very purpose of the Commerce Clause was to create an area of free trade among the several States").

[4] *See, e.g., Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977) (security transfer tax); *Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1939) (cement inspection fee); *I.M. Darnell & Son Co. v. City of Memphis*, 208 U.S. 113 (1908) (property tax); *Brimmer v. Rebman*, 138 U.S. 78 (1891) (meat inspection fee); *Tiernan v. Rinker*, 102 U.S. 123 (1880) (liquor tax); *Webber v. Virginia*, 103 U.S. 344 (1881) (license tax); *Welton v. Missouri*, 91 U.S. 275 (1876) (license tax).

The decision of the Court in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), provides a recent example of the application of this principle. In that case New York had imposed a tax on transfers of certain securities. It had, however, established a lower rate of tax for transfers where the sale of securities in question took place on an exchange located within New York State.[5] The legislative purpose in creating the discrimination was to attract out-of-state sales to local exchanges. 429 U.S. at 320 n.3, 323-34, 327. The Supreme Court held that the tax unconstitutionally discriminated against services performed outside the state. The Court noted that prior decisions of the Court had established beyond any doubt that

> "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' . . . [This] prohibition . . . follows inexorably from the basic purpose of the [Commerce] Clause. Permitting the individual States to enact [such] laws . . . 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." 429 U.S. at 329 (citations omitted).

The Court therefore found the tax unconstitutional because the New York statute, on its face, imposed a higher rate of tax on transfers simply because the underlying sales were effected outside the state. Moreover, the Court found that the state legislature's intent in adopting the tax was "wholly inconsistent with the free trade purpose of the Commerce Clause." 429 U.S. at 336.

The Court's decision in the *Boston Stock Exchange* case rested in part on a venerable precedent factually indis-

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[5] Specifically, the New York law provided that nonresidents of New York received a 50-percent reduction in the rate of tax if the transaction involved an in-state sale. The statute also imposed a ceiling on the total tax liability of any taxpayer (resident or nonresident) for a single transaction when it involved a sale within New York. 429 U.S. at 324-25.

tinguishable from the current case. In *Guy v. Baltimore*, 100 U.S. 434 (1880), Baltimore had imposed a tax on goods landed at the city's docks. Maryland products were excluded from taxation. 100 U.S. at 440-41. The Court found the tax unconstitutional on its face. By its terms, the tax imposed a burden on out-of-state goods to which Maryland products were not subject, thus violating the established rule that "no State can . . . impose upon the products of other States . . . more onerous . . . taxes than it imposes upon the like products of its own territory." 100 U.S. at 439. In so holding, the Court rejected the same statutory purpose now cited by the Hawaii Supreme Court. The Court held that under the Commerce Clause the states cannot "build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." 100 U.S. at 443. Were states allowed to impose discriminatory taxes such as Baltimore's, "the trade and business of the country [would be placed] at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States." The Commerce Clause clearly was intended to prevent this result. 100 U.S. at 442. *Welton v. Missouri*, 91 U.S. 275 (1876), another decision relied upon by the *Boston Stock Exchange* Court, similarly invalidated a license tax on peddlers selling out-of-state goods on the ground that the tax discriminated against goods by "reason of [their] foreign origin." 91 U.S. at 282.

Cases like *Boston Stock Exchange*, *Guy*, and *Welton* provide clear examples of the application of the "no-discrimination" rule. Where a tax discriminates on its face, and the state does not impose any comparable tax burden on in-state goods, the tax is unconstitutional.[6]

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[6] Situations sometimes arise where tax statutes, discriminatory on their face, turn out not to be discriminatory in fact because other statutes impose the same tax burden on in-state products. Such taxes may be valid. *E.g.*, *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1869). Conversely, there are cases in which state laws do not, on

No further factual inquiry into the effect of the discriminatory tax is necessary. *See, e.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. at 330-32.[7]

The Hawaii Supreme Court wholly ignored this line of authority. Instead, it sought to defend the statute on the ground that it did not discriminate against out-of-state *residents*. Resident and nonresident corporations, said the court, were equally subject to taxation if they sold non-Hawaiian wine. App. at A-24 to 25, A-35 n.12. At the same time, they were equally "free to engage in the wholesaling of . . . [Hawaiian products] if [they had] reason to believe this [would] relieve [their] tax burden" in Hawaii. App. at A-25. Under these circumstances, the court "detect[ed] no discrimination against . . . interstate commerce" in violation of the Commerce Clause. *Id.*

In focusing on the question of *residence*, the Hawaii court missed the point. One of the principal purposes of

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their face, appear to be discriminatory but where (as applied) the laws have a discriminatory effect. Such laws are, of course, unconstitutional. *E.g., Nippert v. City of Richmond*, 327 U.S. 416, 431-32 (1946).

[7] The Court in *Boston Stock Exchange* held, without surveying the actual effects of the tax on out-of-state exchanges, that the New York stock transfer tax was unconstitutional on its face because it "foreclose[d] tax-neutral decisions and create[d] both an advantage for the exchanges in New York and a discriminatory burden on commerce to . . . sister States." 429 U.S. at 331. The New York Court of Appeals in the *Boston Stock Exchange* case had found that the tax had *no* "practical" effect on out-of-state sales by New York residents because " 'it [was] more than likely . . . that [a] sale [by a resident] would be made on a New York exchange in any event.' " 429 U.S. at 333. But the Supreme Court, relying on the discriminatory language of the statute alone, discarded the New York court's finding. In the Court's words, the statutory tax burden "cannot be deemed to have no practical effect on interstate commerce." 429 U.S. at 334. *See also Maryland v. Louisiana*, 451 U.S. 725, 756-57 (1981) (holding that a complicated scheme of taxes imposed on natural gas passing through Louisiana was unconstitutional because, "[o]n its face" and by its "obvious economic effect," it unconstitutionally discriminated against out-of-state gas users).

the Commerce Clause was to protect out-of-state *goods* against discriminatory state taxes, even where the tax falls equally on in-state and out-of-state sellers. Under the Articles of Confederation, discriminatory state taxes posed a serious threat to the nation's economy, as the states waged commercial war against one another by imposing duties on imports from other states.[8] The Commerce Clause was intended to end the trade wars, establish a national market for goods, and guarantee that states could not advance their own commercial interests by using discriminatory taxation to restrict the sale of out-of-state goods within their borders.[9] Accordingly, this Court has consistently struck down state taxes that discriminate against out-of-state goods, even where resident and nonresident taxpayers have received equal treatment. For example, in *Welton v. Missouri*, the Court invalidated the Missouri license tax despite its equal application to all peddlers of out-of-state goods, because the Commerce Clause protects goods "from *any* [discrimina-

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[8] *See* J. Fiske, *The Critical Period of American History 1783-1789* 148-52 (1897) (states waged "commercial war" through duties on out-of-state goods); J. Nowak, R. Rotunda & J. Young, *Handbook on Constitutional Law* 132-33 (1978) (retaliatory state taxation under Articles of Confederation); C. Warren, *The Making of the Constitution* 567 (1929) (states imposed duties on goods from other states).

[9] *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (Commerce Clause intended to "avoid the [nation's] tendencies toward economic Balkanization"); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535, 538 (1949) (Commerce Clause protects interstate movement of goods); *Webber v. Virginia*, 103 U.S. 344, 350 (1881) (Framers intended Commerce Clause to prevent use of discriminatory taxes "to exclude . . . foreign article[s] and prevent competition with . . . home product[s]").

See also Reeves, Inc. v. Stake, 447 U.S. 429, 436-37 (1980) ("[T]he Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace"); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978) (Commerce Clause forbids a state's "discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently").

tory] burdens imposed by reason of . . . foreign origin." 91 U.S. at 282 (emphasis added). Similarly, in *I.M. Darnell & Son Co. v. City of Memphis*, 208 U.S. 113 (1908), the Court struck down a Tennessee property tax favoring in-state goods, even though it applied to Tennessee and non-Tennessee property owners alike.[10] For the *Darnell* Court, the sole issue was whether the state "discriminate[d] by taxation . . . against property brought from other States." 208 U.S. at 121.[11]

The *per se* rule of illegality for discriminatory state taxes, which this Court has consistently affirmed over the past 100 years, serves the practical needs of both the states and private litigants. State taxation of interstate commerce is a frequent source of litigation, and these cases often raise complex issues of fact. Clear, easily administrable rules are necessary if state legislatures and courts are to comply with Commerce Clause principles without repeated litigation before this Court.[12]

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[10] Indeed, in *Darnell*, the tax was challenged by a Tennessee corporation domiciled within the state. 208 U.S. at 116.

[11] *See also Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977) (state transfer tax unconstitutional even though it imposed no higher tax on nonresidents of New York than on New York residents).

The Hawaii tax statute is, of course, no less discriminatory because it takes the form of an exemption for in-state goods from a tax imposed on all other goods. In *Darnell*, the Court struck down, as discriminatory, a Tennessee property tax that exempted a class of in-state goods from a tax imposed on goods produced outside the state.

[12] Because of limitations on the jurisdiction of the lower federal courts, this Court will often be the only federal court open to parties seeking to challenge the unconstitutionality of state tax laws. Under the Tax Injunction Act, 28 U.S.C. § 1341 (1976), the federal district courts may not "enjoin, suspend or restrain" the assessment of any state tax where a "plain, speedy and efficient remedy" is available through the state courts. The Supreme Court has interpreted "plain, speedy and efficient" broadly. Thus, where a state provides a reasonable procedure for suing to recover a tax

The present rule of *per se* unconstitutionality is such a rule, minimizing confusion and controversy while simultaneously offering maximum protection for the values reflected in the Commerce Clause.

Under the *per se* rule, the applicable legal principles are easy to define and simple to enforce. Moreover, they leave the states free to use many measures to promote their local economies or advance legitimate regulatory policies.[13] The states simply may not use discriminatory taxation to serve these goals. To hold otherwise would be to undercut a fundamental purpose of the Commerce Clause.

Notwithstanding the free-trade principles incorporated in the Commerce Clause, an increasing number of states have disregarded the *per se* rule and are enacting discriminatory tax legislation designed to favor local producers of alcoholic beverages. At latest count, at least 30 states have enacted laws that impose higher taxes on out-of-state alcoholic beverages than on such beverages produced within the state.[14] This interstate rivalry is precisely what the Commerce Clause was designed to pro-

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payment, a taxpayer ordinarily will be required to pay the tax and sue the state for a refund in the state courts, with a right of ultimate appeal to the U.S. Supreme Court. *See Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981).

[13] Thus, for example, states may constitutionally employ subsidies to promote local industries that serve the state's environmental needs. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (subsidy program for scrap processors). They may also seek to alleviate unemployment by favoring local residents in awarding government contracts. *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042 (1983) (city order requiring construction work funded by the city to be performed by work forces consisting of at least 50 percent local residents).

[14] *See, e.g.*, Ga. Code Ann. §§ 3-4-60, 3-6-50 (1982 & Supp. 1982) (wine and distilled spirits); Va. Code §§ 4-22.1, 4-25.1 (1983) (wine). Some of the statutes involve a state's attempt to retaliate against discriminatory taxes imposed on its products by other states. *See, e.g.*, Del. Code Ann. tit. 4, § 728 (1975) (beer).

hibit and what a *per se* rule of unconstitutionality must prevent. A reaffirmation of the rule in the current case will serve a significant constitutional purpose.

II. The Twenty-first Amendment to the Constitution Does Not Validate Hawaii's Tax.

If this case involved milk or fruit juice, our analysis would be at an end. However, since this case involves a tax on liquor we must consider what, if any, effect the Twenty-first Amendment has on the result. We conclude that it has none.

The Twenty-first Amendment to the Constitution, adopted in 1933, repealed Prohibition.[15] Section 2 of that Amendment reserved to the states certain powers to regulate liquor; thus, it provides that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. This Court has made clear, however, that Section 2 does not repeal any other provision of the Constitution. State laws regulating the importation, sale or use of liquor must be reconciled with constitutional provisions such as the Commerce Clause, and the Court has developed techniques for accommodating the relevant constitutional interests.

As we show in Part A below, the process of accommodation spelled out in the decisions of this Court requires, as a first step, an identification of the interest the state's enactment is designed to serve. To the extent that the Twenty-first Amendment was designed to provide constitutional validation for such a state interest, the second step in the process—a balancing of the competing constitutional interests—comes into play. Under this

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[15] Section 1 provides, "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." U.S. Const. amend. XXI, § 1.

method of analysis, it is clear that the interest Hawaii has identified in this case—promotion of local industry—has no Twenty-first Amendment significance. Accordingly, the substantial constitutional interest in free trade among the states is decisive, and the Twenty-first Amendment cannot save the Hawaii tax.

As we show in Part B below, the history of state liquor regulation and litigation which culminated in adoption of the Twenty-first Amendment makes clear that Section 2 of that Amendment was intended to reserve to the states only the authority to enforce reasonable, nondiscriminatory laws aimed at counteracting the evils believed to be associated with liquor and the liquor trade. Whatever powers states may have to enact laws designed to promote temperance, Section 2 was not intended to permit states to do what Hawaii has done here—to adopt discriminatory taxes for the purpose of promoting the business interests of local liquor producers.

A. *Where State Liquor Laws Promote Interests Inconsistent with Other Constitutional Provisions, Including the Commerce Clause, a Balancing Analysis Is Required.*

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964), established the analytical framework applicable to this case. *Idlewild* involved application of a state liquor licensing law to a retail liquor business located at John F. Kennedy Airport in New York City. The retailer purchased the liquor outside the state under the supervision of the Federal Bureau of Customs, imported and transported it to the airport, sold it to departing international passengers, and placed it immediately on the aircraft for ultimate use in a foreign country. 377 U.S. at 325. The New York State Liquor Authority attempted to shut down Idlewild's business, claiming that it was operating in violation of the state's liquor li-

censing law. That law required retail liquor outlets to have a street-level entrance on a public thoroughfare, and since Idlewild could not comply with this requirement, it could not obtain a license. 377 U.S. at 326. The Court acknowledged that if the commodity involved in the case were not liquor, "but grain or lumber, the Commerce Clause would clearly deprive New York" of the power to terminate the business. 377 U.S. at 329. Thus, the case presented squarely the issue of how to analyze a conflict between the Commerce Clause and a liquor regulation arguably validated by Section 2 of the Twenty-first Amendment.

After reviewing its earlier decisions, the Court concluded that the Twenty-first Amendment had not "operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned . . . ." 377 U.S. at 331-32. Indeed, such an interpretation would be "an absurd over-simplification." *Id.* Rather, the Court reasoned, "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.* Thus, a balancing analysis, considering the interests involved in each specific case, was required.

In applying the balancing test to the facts of the *Idlewild* case, the Court first examined the state interest in the regulation. Since Idlewild's liquor was imported and sold in New York for ultimate use and delivery in a foreign country, the state had a legitimate interest in preventing the unlawful use or diversion of the liquor to potential users in New York. This interest clearly served the purposes of the Twenty-first Amendment. 377 U.S. at 333. The Court next considered whether application of the challenged statute furthered this interest and concluded that it did not since, "[a]s the District Court emphasized, this case does not involve 'measures aimed at preventing unlawful diversion or use of alcoholic

beverages within New York.' " 377 U.S. at 333-34. Under such circumstances, the Court concluded that the federal interest in the free flow of commerce—protected by the Commerce Clause—required that the state's attempt to regulate Idlewild be invalidated. 377 U.S. at 334.

Since 1964, this Court has repeatedly affirmed the applicability of this type of test to cases involving assertions that the Twenty-first Amendment authorized state regulations prohibited by other provisions of the Constitution. Thus, in *California v. LaRue*, 409 U.S. 109 (1972), the Court resolved an asserted conflict between the First Amendment and the state's right to regulate liquor by applying the *Idlewild* test. Four years later in *Craig v. Boren*, 429 U.S. 190 (1976), the Court similarly resolved a Fourteenth Amendment issue by applying the *Idlewild* analysis. And most recently, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court again affirmed the applicability of the test where Commerce Clause interests are involved.

The issue in *Midcal* was whether California's legislated system of wine wholesale price posting and resale price maintenance violated the Sherman Act and, if so, whether it was nonetheless a valid exercise of the state's power under the Twenty-first Amendment.[16] To resolve this issue, the Court engaged in a "pragmatic effort to harmonize [the] state and federal powers" involved in the case before it. 445 U.S. at 109. The state's interests in the resale price maintenance system, identified by the California court, were the promotion of temperance and of orderly market conditions, *i.e.*, protection of small liquor dealers from predatory pricing policies of large retailers. 445 U.S. at 112. The California Court of Appeals had found that it was unlikely that those in-

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[16] The Court first concluded that California's pricing statute was not protected by the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), and thus violated the Sherman Act.

terests were in fact served by the challenged price maintenance system. 445 U.S. at 112-14.[17] Accordingly, the California court concluded that the statute must give way to the Commerce Clause because a legitimate state interest was not present and there was a strong national policy in favor of competition. The Supreme Court affirmed, 445 U.S. at 114, leaving open the question "whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy." 445 U.S. at 113-14.

In all of these cases, the Court considered and rejected the reasoning which underlay several older decisions of this Court suggesting that the Twenty-first Amendment conferred power on the states to enact any liquor regulation, regardless of its purpose or discriminatory effect, and regardless of other constitutional provisions. *See Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939); *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391 (1939); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936). Thus, in *Craig v. Boren*, 429 U.S. at 207, the Court explicitly rejected the suggestion in *Young's Market* that the Twenty-first Amendment repealed the Equal Protection Clause, stating:

> "[T]he Court has never recognized sufficient 'strength' in the Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause."

Accord California v. LaRue, 409 U.S. at 115 (rejecting the suggestion that "the Twenty-first Amendment super-

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[17] Studies cited by the lower court had indicated that there was little correlation between resale price maintenance and temperance, and that fair trade laws were not necessary to the economic survival of small retailers. 445 U.S. at 112-13.

sedes all other provisions of the United States Constitution in the area of liquor regulations"). And, of course, *Idlewild* and *Midcal* both held that a balancing analysis was appropriate in cases where state liquor laws are challenged under the Commerce Clause.[18] The *Midcal* Court put the early cases in perspective:

> "The Court upheld the challenged state authority in each [of those early cases], largely on the basis of the States' special power over the 'importation and transportation' of intoxicating liquors. Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that § 2 'freed the States from all restrictions upon the police power to be found in other provisions of the Constitution.' " 445 U.S. at 108.[19]

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[18] *See also Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42 (1966).

[19] These early cases have, in our view, been effectively overruled. If they had any residual vitality, it would be limited to the precise facts of those cases. *Young's Market* involved the question whether a $500 license fee imposed on importers of liquor was permissible. The Court upheld the license fee, noting that it was not in fact discriminatory since a license fee of $750 was imposed on domestic manufacturers of liquor. This case, on the other hand, presents precisely the issue of a discriminatory tax on out-of-state producers. In addition, and unlike this case, the Court implied in *Young's Market* that the license fee was a legitimate exercise of the state's power to regulate liquor in the interest of public health and welfare. The Court said that "the exaction of a high license fee for [liquor] importation may . . . serve as an aid in policing the liquor traffic." 299 U.S. at 63.

The remaining cases are distinguishable in that they involved the actual exclusion of liquor in whole or in part from importation into the state. Thus, *Mahoney v. Joseph Triner Co.*, 304 U.S. 401 (1938), involved a regulation limiting the importation of liquor to brands registered with the U.S. Patent Office; *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939), involved a statute excluding beer manufactured in a state which discriminated against locally produced beer; and *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939), involved the exclusion of liquor manufactured in states that discriminated against imported liquor. On the surface,

The test developed in the *Idlewild* and *Midcal* cases, discussed above, is a two-step process. The actual balancing of the state's interest against the constitutional limit on state power is the second part of the process. Before the balancing can begin, it is necessary to decide the extent to which the interest asserted by the state gains constitutional significance because of the existence of the Twenty-first Amendment.[20] Section 2 of the Amendment was designed to reconfirm the power of the states to enact appropriate laws to promote temperance and, in particular, to permit states to remain "dry" after the repeal of Prohibition, if they so wished.[21] No such interests were served by the regulation in *Idlewild,* and in *Midcal* the state regulations were found to serve no valid purpose at all. Thus, the Twenty-first Amendment did not add any weight to the state interest in the balancing analysis.

The result should be the same here. Since the state's interest in this case—promotion of local industry—has no Twenty-first Amendment significance, the federal interest in free trade embodied in the Commerce Clause and described in Part I of this brief should be controlling, and the tax must be invalidated.

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exclusions appear more likely to fall under the language of Section 2. However, the history of Section 2 shows that the powers being granted to the states, whatever they encompassed, specifically denied authority to levy discriminatory taxes. *See* Part B *infra.*

[20] In *Midcal,* because of the state court's finding that the statute served no asserted interest, the Commerce Clause interest easily prevailed. In the balance in *Idlewild,* the Court reached the same conclusion.

[21] *See Dugan v. Bridges,* 16 F. Supp. 694 (D.N.H. 1936); *Pacific Fruit & Produce Co. v. Martin,* 16 F. Supp. 34 (W.D. Wash. 1936). *See also* Part B *infra.*

B. *The Court's Balancing Test Reflects the Legislative History and Purposes of the Twenty-first Amendment.*

The history of the Twenty-first Amendment shows that Section 2 of the Amendment was intended to enable the states to enforce reasonable, nondiscriminatory laws to counteract evils believed to be associated with liquor and the liquor trade. Section 2 incorporated into the Constitution the provisions of two pre-Prohibition statutes. These statutes authorized states to regulate alcoholic beverages principally to enable them, if they chose, to exclude beverages from the state or to limit or control their use. The statutes also prohibited the states from using this regulatory power to promote local producers by discriminating against out-of-state producers.

The history of the Amendment is unequivocal in two respects. First, it shows—as this Court has held—that the states' power was not to be absolute, thus confirming the propriety of the balancing test employed by the Court to accommodate a conflict between a state interest asserted under the Amendment and other constitutional interests. Second, it shows that the scope of the regulatory power conferred did not, in any event, encompass authority to promote a local liquor industry by discriminating between in-state and out-of-state producers. The history thus confirms that a state can assert no Twenty-first Amendment interest when it enacts a discriminatory tax, like Hawaii's, designed to promote a local industry.

In the nineteenth century, this Court had held that states could prohibit and regulate the sale and distribution of liquor brought within their territory as a proper exercise of their police power. *See License Cases*, 46 U.S. (5 How.) 504 (1847).[22] The *License Cases*, however,

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[22] Thus Justice Taney said:

"And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the consti-

were overruled in *Leisy v. Hardin*, 135 U.S. 100 (1890). There the Court struck down an Iowa law prohibiting the manufacture or sale of liquor insofar as it applied to the sale by the importer in the original package or keg. As a result of *Leisy*, the interstate mail order liquor business flourished and dry states were thought to be "powerless to protect themselves against the importation of liquor into the States."[23]

Congress responded four months after *Leisy* was decided by enacting the Wilson Act,[24] which authorized states to enact reasonable laws in the exercise of their valid police powers to regulate imported as well as domestically produced liquor "upon arrival" in the state.[25]

> tution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper." 46 U.S. at 577.

Accord Mugler v. Kansas, 123 U.S. 623 (1887) (state could constitutionally prohibit the manufacture and sale of intoxicating liquors). These early cases nevertheless held that state regulations that stopped short of prohibition could not discriminate without a logical basis between citizens in the same class or against goods produced outside the state. Such discrimination placed an impermissible burden on interstate commerce in violation of the Commerce Clause. *See Walling v. Michigan*, 116 U.S. 446 (1886); *Tiernan v. Rinker*, 102 U.S. 123 (1880).

[23] 76 Cong. Rec. 4170-71 (1933) (remarks of Sen. Borah, reviewing the history of liquor regulation during debate on Section 2 of the Twenty-first Amendment).

[24] As Senator Wilson explained, "[the] bill in its amended form is a response to the suggestion contained in [the *Leisy* case] . . . . If a State shall desire prohibition it can adopt it and exercise it and enforce it under the provisions of this bill." 21 Cong. Rec. 4954 (1890).

[25] The Wilson Act provides in part:

> "All fermented, distilled, or other intoxicating liquors or liquids transported into any State . . . or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State . . . be subject to the operation and effect of the laws of such State . . . enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids

The Act specifically forbade discriminatory treatment of liquor produced outside the state, providing that a state could subject "intoxicating liquor" that had arrived within its territory to its laws only "to the same extent and in the same manner as though such . . . liquors had been produced in such State . . . ." This Court held in *Scott v. Donald*, 165 U.S. 58 (1897), that discriminatory treatment was not authorized by the Act and that a statute authorizing such treatment would be void since it would impermissibly burden interstate commerce:

> "It is sufficient for the present cases to hold, as we do, that when a State recognizes the manufacture, sale and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other States; that such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting State as against similar products of the other States." 165 U.S. at 101.[26]

Subsequent Supreme Court decisions, however, interpreted the "upon arrival" provision of the Wilson Act to mean that the state's regulatory powers under the Act could not take effect until the liquor was delivered to the ultimate consignee. Thus, until the interstate transaction had been consummated by delivery to the consignee, the state was powerless to interfere with it, even in a nondiscriminatory manner.[27] As a result, dry states once

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or liquors had been produced in such State . . . and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Act of August 8, 1890, ch. 728, 26 Stat. 313, 27 U.S.C. § 121 (1976).

[26] *Accord Brown-Forman Co. v. Kentucky*, 217 U.S. 563 (1910); *Reymann Brewing Co. v. Brister*, 179 U.S. 445 (1900); *Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 444 (1898).

[27] *See Louisville & Nashville R.R. v. F.W. Cook Brewing Co.*, 223 U.S. 70 (1912); *Adams Express Co. v. Kentucky*, 206 U.S. 129 (1907); *Heyman v. Southern Ry.*, 203 U.S. 270 (1906); *American Express Co. v. Iowa*, 196 U.S. 133 (1905); *Rhodes v. Iowa*, 170 U.S. 412 (1898).

again found themselves unable to prohibit their citizens from receiving liquor acquired from mail order dealers in wet states.

In 1913, the Webb-Kenyon Act[28] was passed to close this loophole.[29] Like the Wilson Act, the Webb-Kenyon

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[28] The Webb-Kenyon Act provides in part:

> "The shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . or from any foreign country into any State . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is prohibited." Ch. 90, 37 Stat. 699 (1913), 27 U.S.C. § 122 (1976), *re-enacted*, ch. 740, § 202(b), 49 Stat. 877 (1935).

[29] The purpose of the Webb-Kenyon Act, clear from the legislative history, was simply to remedy the "upon arrival" loophole created by this Court's interpretation of the provision of the Wilson Act. The Webb-Kenyon Act, however, was not intended to change any other aspect of the Wilson Act—including its nondiscrimination provisions. Thus, Senator Kenyon, a sponsor of the bill, said:

> "Every State in which the traffic in liquors has been prohibited by law is deluged with whiskey sent in by people from other States under the shelter of the interestate commerce law. . . . [The Webb-Kenyon Act's] purpose, and its only purpose, is to remove the impediment existing as to the States in the exercise of their police powers regarding the traffic or control of intoxicating liquors within their borders. . . . Where a State has determined that intoxicating liquors shall not be manufactured or sold within its borders, is it not manifest that the citizens of other States should not be granted greater privileges in that State than its own citizenship enjoy?" 49 Cong. Rec. at 761, 707 (1912).

The Supreme Court, upholding the Webb-Kenyon Act in *Clark Distilling Co. v. Western Maryland Ry.*, 242 U.S. 311 (1917), similarly held that the Act was simply an extension of the Wilson Act:

> "Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this Court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the

Act was interpreted to authorize states to interfere with interstate commerce only with reasonable laws enacted in the exercise of their valid police powers. Laws that discriminated against out-of-state liquor producers were not authorized by the Webb-Kenyon Act and were thus invalid under the Commerce Clause.[30] As the court said in *Brennen v. Southern Express Co.*, 106 S.C. 102, 90 S.E. 402 (1916):

> "[W]hile [the Webb-Kenyon Act] does divest intoxicating liquors shipped into a state in violation of its laws of their interstate character and withdraw from them the protection of interstate commerce, it evidently contemplated the violation of only valid state laws. It was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other states which are recognized as subjects of lawful commerce by the law of the state making such discriminations. . . ." 106 S.C. at 108-09, 90 S.E. at 404.[31]

Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws for naught." 242 U.S. at 323-24. *See also* 242 U.S. at 330.

[30] *See Evansville Brewing Ass'n v. Excise Comm'n*, 225 F. 204 (D. Ala. 1915); *Premier-Pabst Sales Co. v. McNutt*, 17 F. Supp. 708 (S.D. Ind. 1935); *Southern Express Co. v. Whittle*, 194 Ala. 406, 69 So. 652 (1915); *Adams Express Co. v. Commonwealth*, 154 Ky. 462, 157 S.W. 908 (1913); *Monumental Brewing Co. v. Whitlock*, 111 S.C. 198, 97 S.E. 56 (1918); *Brennen v. Southern Express Co.*, 106 S.C. 102, 90 S.E. 402 (1916).

[31] The court in *Evansville Brewing Ass'n v. Excise Comm'n*, 225 F. 204, 209 (D. Ala. 1915), similarly stated:

> "[S]ince the passage of the Wilson Law and the Webb-Kenyon Law, the state of Alabama has the power to exact a license from the Alabama seller of beer made in another state and shipped into this state, if the license is for police purposes and works no unjust discrimination against the foreign made beer. . . .
>
> The exaction of an additional license of the Alabama wholesale dealer for the privilege of selling foreign made beer, when

In 1919, the Eighteenth Amendment[32] was adopted, mooting for a time the debate over the scope of state power to regulate alcoholic beverages. But introduction of the proposal to repeal Prohibition sparked the controversy once again. Supporters of the dry states urged that the Webb-Kenyon Act be incorporated into the Twenty-first Amendment, fearing that the Act might otherwise be overruled in the future by the Supreme Court or modified or even repealed by Congress, leaving the dry states unprotected.[33] Thus, Senator Blaine reported the view of the Senate Judiciary Committee to the Senate:

> "In the case of Clark against Maryland Railway Co. there was a divided opinion [with respect to the constitutionality of the Webb-Kenyon Act]. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line." 76 Cong. Rec. 4141 (1933).

Senator Bingham similarly noted that Section 2 was but a "restatement of the Webb-Kenyon law, already on the law books, which would write into the Constitution the

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a like license is not exacted for the sale of beer of domestic manufacture, is an evident discrimination against the seller of the foreign made beer."

[32] The Eighteenth Amendment provides in part:

"[T]he manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. Const. amend. XVIII, § 1.

[33] The Wilson and Webb-Kenyon Acts had been upheld by divided courts. *See Clark Distilling Co. v. Western Maryland Ry.*, 242 U.S. 311 (1917); *In re Rahrer*, 140 U.S. 545 (1891).

right of the dry states to have Federal protection against importation of liquor." 76 Cong. Rec. 4228 (1933).[34]

During the years immediately after its enactment, Section 2 of the Twenty-first Amendment was found by most lower courts that considered the issue to be little more than an incorporation into the Constitution of the Webb-Kenyon Act.[35] Section 2 was therefore found only to authorize states to enforce reasonable laws adopted in the exercise of their police powers to counteract the evils of liquor and the liquor trade—not to authorize states

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[34] *Accord* remarks of Senator Borah, calling Section 2 "vital" to protect the "dry states":

> "[I]t has been said that the Webb-Kenyon Act is a sufficient protection to the dry states. The Webb-Kenyon Act was sustained by the Supreme Court . . . by a divided court. . . . President Taft, who was afterwards Chief Justice—vetoed it on the ground that it was unconstitutional. . . . Mr. Justice Sutherland, who is now upon the Supreme Bench, argued before the Senate that it was unconstitutional. Therefore, Mr. President, we are turning the dry states over for protection to a law which is still of doubtful constitutionality and which, as it was upheld by a divided court, might be held unconstitutional upon re-presentation of it. Secondly we are asking the dry states to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law. . . . I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating [the Webb-Kenyon Act] permanently in the Constitution of the United States." 76 Cong. Rec. 4170, 4172 (1933).

See also id. at 4140-41 (remarks of Sen. Blaine); *id.* at 4171 (remarks of Sen. Wagner); *id.* at 4172 (remarks of Sen. Lewis).

[35] *See Dugan v. Bridges*, 16 F. Supp. 694 (D.N.H. 1936); *Pacific Fruit & Produce Co. v. Martin*, 16 F. Supp. 34 (W.D. Wash. 1936); *Young's Market Co. v. State Bd. of Equalization*, 12 F. Supp. 140 (S.D. Cal. 1935), *rev'd*, 299 U.S. 59 (1936); *Premier-Pabst Sales Co. v. State Bd. of Equalization*, 13 F. Supp. 90 (S.D. Cal. 1935); *Joseph Triner Corp. v. Arundel*, 11 F. Supp. 145 (D. Minn. 1935). *But see Premier-Pabst Sales Corp. v. Grosscup*, 12 F. Supp. 970 (E.D. Pa. 1935), *aff'd on other grounds*, 298 U.S. 226 (1936) (Supreme Court affirming for lack of standing, without reaching the constitutional issue).

to adopt discriminatory regulations or measures having no legitimate relation to the purposes of the Twenty-first Amendment.[36]

This history of the Twenty-first Amendment reinforces the appropriateness of the balancing approach the Court has developed in the *Idlewild/Midcal* line of cases. As these early court decisions recognized, the Twenty-first Amendment can support the validity of state statutes regulating liquor only to the extent that the state is attempting to serve the purposes underlying that Amendment. Whatever powers the states may have in this area, the Twenty-first Amendment was not added to the Constitution to permit the states to promote local producers of alcoholic beverages at the expense of producers located elsewhere. Statutes designed to serve that purpose

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[36] Discriminatory state liquor laws were struck down generally on Commerce Clause or equal protection grounds, or both. *See* cases cited *supra* note 35.

In *Pacific Fruit & Produce Co. v. Martin*, 16 F. Supp. 34 (W.D. Wash. 1936), a three judge district court held that a Washington state requirement that nonresident—but not resident—beer producers be licensed violated the Commerce Clause and was not saved by the Twenty-first Amendment, stating:

> "While it may be conceded that the intent of the Wilson Act, . . . the Webb-Kenyon Act, . . . and the Twenty-First Amendment, was to take from intoxicating liquor the protection of the interstate commerce laws in so far as necessary to deny them an advantage over the intoxicating liquors produced in the state into which they were brought, yet, none of them show an intent or purpose to so abdicate control over interstate commerce as to permit discrimination against the intoxicating liquor brought into one state from another. . . . It follows that [the Washington statute] is void . . . because it violates the commerce clause . . . ." 16 F. Supp. at 39-40.

And *see Dugan v. Bridges*, 16 F. Supp. 694 (D.N.H. 1936), where a three judge district court upheld a nondiscriminatory New Hampshire licensing fee but pointed out that a regulation unrelated to the state's legitimate interests—such as a tax on imported liquor to promote the domestic liquor industry—would be invalid. 16 F. Supp. at 707.

must therefore stand or fall without regard to the Twenty-first Amendment. Since, as we have shown, the Twenty-first Amendment does not save the Hawaii statute, that statute must fall under the Commerce Clause.[37]

CONCLUSION

The Hawaii tax discriminates against liquor produced out-of-state for the sole purpose of promoting the local liquor industry. As such, it is invalid on its face under the Commerce Clause. Moreover, a tax whose purpose is pure economic protectionism can derive no constitutional justification from the Twenty-first Amendment. For these reasons, the judgment of the Hawaii Supreme Court must be reversed.

Respectfully submitted,

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[37] Since the statute plainly violates the Commerce Clause and is not saved by the Twenty-first Amendment, the Court need not reach the issue whether the tax also violates the Import-Export Clause. In any event, in view of the Court's treatment of discriminatory taxes of this kind, there is no basis for reaching a result under the Import-Export Clause different from that under the Commerce Clause. *See Department of Revenue v. Association of Washington Stevedoring Co.*, 435 U.S. 734 (1978); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).

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